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No. 1165

Supreme Court, U.S.
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In the Supreme Court of the United States

WILLIAM A. EUBANK,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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No.

WILLIAM A. EUBANK,

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioner, William A. Eubank, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered on September 29, 1970.

Opinion Below

The opinion of the Supreme Court of Illinois, not yet reported, is attached as Appendix A. The Court's judgment is attached as Appendix B.

Jurisdiction

The opinion of the Supreme Court of Illinois was entered on September 29, 1970. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(3).

Questions Presented

The questions presented for review by this Court are:

1. Whether, after this Court's decisions in *United States* v. *Wade*, 388 U.S. 218 (1967), and *Gilbert* v. *California*, 388 U.S. 263 (1967), testimony may be admitted regarding a pre-trial confrontation for identification purposes while petitioner was alone and unrepresented by counsel.

2. Whether the *Wade-Gilbert* principles are applicable solely to post-indictment identifications.

3. Whether, because petitioner's trial counsel failed to object to testimony regarding a counselless pre-trial identification, petitioner is precluded from asserting that his rights under the Sixth Amendment were violated.

This case involves the provision of the Sixth Amendment which guarantees the defendant the right "to have the assistance of counsel for his defense."

STATEMENT OF THE CASE

In August, 1967, petitioner was indicted in Cook County for the armed robbery of Yolanda Kuba. The case was tried without a jury on November 21 and 22, 1968.

The state called two witnesses, Mrs. Kuba and a Captain O'Brien of the Oak Lawn, Illinois police department.

Mrs. Kuba testified on her direct examination that on December 21, 1966, the day of the robbery, petitioner came to her home dressed as a telephone company employee. She

testified that she watched him trying to enter the basement of the house from the outside, that he then came back into the house and went into the basement, and that he then returned to the main part of the house holding a gun. She estimated that the man was in the house for 15 minutes. (Tr. 7-17.)

In January, 1967, Mrs. Kuba was shown a group of photographs by the police, from which she identified one as being a photograph of the man who had robbed her. (Tr. 19-20.)

For purposes of this Petition, the critical incident occurred on July 27, 1967, more than 8 months after the robbery. On that day, Mrs. Kuba was taken by the local chief of police (Captain O'Brien) to the federal courthouse in downtown Chicago. In one of the courtrooms, she saw petitioner "in the first bench in the center . . . sitting alone." They stared at each other and, Mrs. Kuba subsequently testified, she recognized him as the man who had robbed her eight months before. (Tr. 20-24, 26-27.)

On direct examination, Captain O'Brien testified to this same courtroom confrontation. In the federal building, he took Mrs. Kuba to the office of the Federal Bureau of Investigation, where they met an agent who took them to the courtroom. There they saw petitioner and "a colored gentleman" sitting about six feet away from petitioner. Captain O'Brien and Mrs. Kuba then had a conversation; later the same day, Captain O'Brien arrested petitioner at his home in a Chicago suburb. (Tr. 61-65.)

The testimony about the federal court identification was not objected to by petitioner's privately retained counsel.

In ruling on the case following the final arguments, the trial judge referred to Mrs. Kuba's identification of petitioner on July 27, 1967 as corroborating her testimony, and made it clear that the confrontation, and her testimony re-

garding it, was a factor in his finding that petitioner was the man who robbed Mrs. Kuba in December, 1966 (Tr. 143, 146):

> "Evidence indicates that at the Federal Building she had an opportunity to again view an individual who proved or indicated was the defendant and certainly had no hesitancy in being able to identify him.
>
> * * *
>
> ". . . Therefore the question that we have a positive identification uncontradicted by any witness with an element and a degree of corroboration by the witness, the police officer who did in fact accompany this witness to the Federal Building and had an opportunity to see her reaction to the confrontation with the defendant leads this court to believe that there is sufficient evidence in this case to deny the motion of the defendant for a directed finding at the conclusion of all of the evidence. The motion will be denied."

On appeal to the Supreme Court of Illinois, petitioner argued that the one-to-one confrontation between Mrs. Kuba and petitioner, when he was alone and not represented by counsel, and Mrs. Kuba's subsequent testimony at trial regarding that confrontation, violated petitioner's rights under the Sixth Amendment to the United States Constitution under the principles set forth by this Court in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967). Petitioner urged the Illinois Supreme Court to reconsider its decision in *People* v. *Palmer*, 41 Ill.2d 571 (1969), that the *Wade-Gilbert* rule applies only to confrontations occurring *after* indictment.

Petitioner argued to the Illinois Supreme Court that he was not precluded from raising this violation of his constitutional rights, because Illinois Supreme Court Rule 615 provides in part that plain errors affecting substantial rights may be noticed although not raised in the trial court, and upon the principle announced by this Court that rights

guaranteed by the United States Constitution cannot be waived by counsel without the knowing concurrence of the defendant. *Fay* v. *Noia,* 372 U.S. 391, 439 (1963); *Henry* v. *Mississippi,* 379 U.S. 443, 450 (1965).

In its decision, a copy of which is appended to this petition, the Illinois Supreme Court did not address petitioner's argument that the *Wade-Gilbert* rule applies to the confrontation in this case, and applied instead the "totality of circumstances" test of *Stovall* v. *Denno,* 388 U.S. 293 (1967), imposing upon petitioner the burden of showing "that the identification procedure employed was so conducive to misidentification as to deprive him of due process of law." The Court then discussed the facts of the confrontation involved here, and concluded that it was not "unduly suggestive." (App. p. 4.)

The Court gave no explanation for its invocation of *Stovall.* Since the identification occurred after the *Wade-Gilbert* rule became applicable, and since the trial court took the out-of-court identification into account in finding petitioner guilty, the only apparent explanation for its rationale is an implicit holding that the *Wade-Gilbert* rule does not apply to *pre*-indictment confrontations.*

The Court concluded its discussion of the identification issue by stating that:

> "In any event, however, defendant's privately retained trial counsel made no substantive objection to the admission of evidence relating to the July 27, 1967, identification, or indeed to any of the identification testimony, and all questions with regard thereto are, accordingly, waived. *Cf. People* v. *French,* 33 Ill.2d 146, 149."

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*. The Supreme Court of Illinois adopted this interpretation of *Wade-Gilbert* in *People* v. *Palmer,* 41 Ill. 2d 571 (1969).

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

A.

To the extent that the decision below rests on a finding that the pre-trial confrontation was not unduly suggestive given the 'totality of circumstances', it misapprehends the applicability of the Stovall, Wade and Gilbert decisions.

The Illinois court held that the pre-trial identification in this case was to be measured against the rule announced in *Stovall* v. *Denno*, 388 U.S. 293 (1967), and accordingly considered the procedures employed at that confrontation, and its effect upon the witness.

Petitioner respectfully submits that this was simply not a *Stovall* situation. Occurring as it did *after* this Court's decisions in *United States* v. *Wade*, 388 U.S. 218 (1967) and *Gilbert* v. *California*, 388 U.S. 263 (1967), the confrontation here is to be tested by the principles of those cases. The Illinois court's inquiry into the "unnecessary suggestiveness" of the procedures used in view of the "totality of circumstances", as conducted in *Stovall* for a pre-trial confrontation held *before* the effective date of the prospective *Wade-Gilbert* rules, denied petitioner the rights vindicated in those decisions.

Viewed correctly, this is a *Gilbert* case. This is not a situation, as was presented to this Court in *Wade*, where it must be determined whether an in-court identification was tainted by a counselless pre-trial identification. Here, the witness testified to the prior confrontation itself, which testimony was a *per se* violation of petitioner's Sixth

Amendment right to counsel. *Gilbert* v. *California,* 388 U.S. at 272-273. The trial judge relied upon that testimony in finding petitioner guilty. The suggestiveness of the procedure used in the prior confrontation, the effect of that confrontation on the later in-court identification, and any independent support for the in-court identification, are all completely irrelevant.

Under *Gilbert,* the only proper alternative to *Gilbert's per se* exclusionary rule would have been a declaration by the court below that the pre-trial confrontation " 'was harmless beyond a reasonable doubt.' *Chapman* v. *State of California,* 386 U.S. 18, 24." *Gilbert* v. *California,* 388 U.S. at 274. Such a declaration would have been utterly untenable in this case, for *the trier of fact twice declared that he considered the testimony regarding the pre-trial confrontation as a factor corroborating Mrs. Kuba's in-court identification.* (Tr. 143, 146.)

B.

To the extent that the decision below rests on that court's prior decision in People v. Palmer that the Wade-Gilbert protections apply only to post-indictment identifications, it is in conflict with the virtually unanimous view of federal and state courts which have ruled on this question.

The Illinois Supreme Court below did not refer to its prior decision in *People* v. *Palmer,* 41 Ill.2d 571 (1969), in which it had held that the *Wade-Gilbert* principles apply only to post-indictment confrontations. However, that Illinois precedent is the only apparent explanation for the decision to deal with the pre-trial confrontation in this case in *Stovall,* rather than *Wade-Gilbert,* terms.

The quality of *Wade-Gilbert* protection extended to Illinois defendants continues to be very different from that

received in virtually every other jurisdiction which has considered the issue.* In the following cases, the courts have rejected any distinction when applying *Wade-Gilbert,* between pre-indictment and post-indictment identifications:

Federal Cases

United States v. *Greene,* 429 F.2d 193 (D.C.Cir. 1970).

Rivers v. *United States,* 400 F.2d 935, 939-940 (5th Cir. 1968).

United States v. *Clark,* 289 F.Supp. 610, 625-627 (E.D.Pa. 1968).

United States v. *Wilson,* 283 F.Supp. 914, 915 (D.D.C. 1968).

State Cases

CALIFORNIA:

People v. *Fowler,* 82 Cal.Rptr. 363, 461 P.2d 643 (1969).

LOUISIANA:

State v. *Singleton,* 253 La. 18, 215 So.2d 838, 841 (1968).

MARYLAND:

Palmer v. *State,* 5 Md.App. 691, 249 A.2d 482, 486 (Ct.Spc.App. 1969).

MASSACHUSETTS:

Commonwealth v. *Guillory,* 254 N.E.2d 427 (Mass. 1970).

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* In *Buchannan* v. *Commonwealth,* 210 Va. 664, 173 S.E. 2d 792 (1969), the court relied upon *People* v. *Palmer* for its application of *Stovall's* "totality of circumstances" test to a pre-indictment identification.

NEVADA:

Thompson v. *State*, 451 P.2d 704, 706 (Nev. 1969).

See also:

NORTH CAROLINA:

State v. *Wright*, 274 N.C. 84, 161 S.E.2d 581, 590 (1968).

TEXAS:

Martinez v. *State*, 437 S.W.2d 842 (Tex.Crim.App. 1969).

WASHINGTON:

State v. *Hicks*, 455 P.2d 943 (Wash. 1969).

Petitioner submits that this pre-indictment—post-indictment distinction is not only unsupported by case law, but works against the rationale of the *Wade* and *Gilbert* decisions and serves to perpetuate the likelihood of the abuses which those decisions were intended to correct. It allows Sixth Amendment rights to be evaded by postponement of indictment. It allows identifications which are not only unmonitored by counsel but are aimed at lay suspects who have, at that point, no reason to notice or remember any particular circumstances of the confrontation.

The mere fact of indictment, without more, simply bears no relation to the question—basic to the *Wade* decision—of whether the possible *consequences* of being without counsel at any stage of a criminal proceeding are such that a defendant may thereafter be seriously disadvantaged, so that the stage becomes "critical." *United States* v. *Wade*, 388 U.S. at 223-227. "Pre-indictment" is simply not synonymous with "non-critical", *cf.*, *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (pre-indictment interrogation as a critical stage). The *People* v. *Palmer* rule, as applied by the Illinois Supreme Court in this case, worked to deny petitioner his Sixth Amendment rights.

C.

Petitioner should not be held to have waived his Sixth Amendment rights by the failure of his trial counsel to object to the testimony regarding the counselless pre-trial identification.

Petitioner's trial counsel did not object during trial to Mrs. Kuba's testimony regarding her identification of petitioner at the July, 1967 confrontation. To hold, however, as the court below did in the appended opinion, that this failure constituted a waiver by petitioner of his federally-guaranteed rights neither comports with the applicable decisions of this Court nor allows the rule of *Gilbert* v. *California* to serve its prophylactic function.

Rights guaranteed by the United States Constitution cannot be waived by counsel without the knowing and understanding concurrence of the defendant. *Fay* v. *Noia*, 372 U.S. 391, 439 (1963); *Henry* v. *Mississippi*, 379 U.S. 443, 450 (1965). There is nothing in this case to indicate that any such concurrence was present here. Nor is there anything which supports the proposition that the failure to object to the testimony regarding the pre-trial confrontation was a conscious decision for tactical or strategic reasons. *Cf. Henry* v. *Mississippi*, 379 U.S. at 451-452.

Moreover, *Gilbert's per se* exclusion of such testimony is disserved by the finding below that the petitioner waived his Sixth Amendment rights. The *Gilbert* rule functions as "an effective sanction to assure that law enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." 388 U.S. at 273. If waiver may be found, in the absence of any indication of a defendant's concurrence—knowing or otherwise—the deterrent effect of the sanction may to that extent be undermined.

Finally, the failure of petitioner's counsel to object at trial did not lull the prosecution into presenting dubious testimony which could have been explored or buttressed on the spot if only petitioner had given notice that it was objectionable. Under *Gilbert*, Mrs. Kuba's testimony concerning the pre-trial confrontation was inadmissible *per se*, and no amount of evidence showing that it had an independent source would have justified it. *Gilbert* v. *California*, 388 U.S. at 273.

The violation of petitioner's right to counsel was fundamental, and was referred to by the trial court as a factor in its judgment against petitioner. Faced with these consequences, and lacking any basis for finding a knowing waiver, the court below erred in holding that petitioner waived his rights under the Sixth Amendment.

Conclusion

For the foregoing reasons, petitioner submits that this petition for writ of certiorari should be granted.

Respectfully submitted,

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December 28, 1970

APPENDIX

APPENDIX A

Opinion of the Supreme Court of Illinois, September, 1970.

MR. JUSTICE CULBERTSON delivered the opinion of the Court:

Defendant, William A. Eubank, was convicted of the offense of armed robbery (Ill. Rev. Stat. 1965, ch. 38, par. 18—2) after a bench trial in the circuit court of Cook County and sentenced to imprisonment in the penitentiary for a term of not less than 10 nor more than 15 years. He appeals directly to this court, contending that certain of his constitutional rights were violated prior to and during the course of the proceedings which resulted in his conviction. See our Rule 302, 43 Ill.2d R. 302.

During the trial, Mrs. Yolanda Kuba, the victim of the robbery charged as having been committed by defendant, testified that at about 1:15 P.M. on December 21, 1966, a person ostensibly dressed as a telephone company serviceman came to her home at 9116 South Komensky in Oak Lawn, Illinois. Present at the home were Mrs. Kuba and her mother, one Mrs. Lewis, age 72 at the time in question. The caller told Mrs. Kuba that he was from the telephone company and that it would be necessary for him to disconnect her telephone for a period of about 20 minutes. After gaining entrance, the person went to the basement of the Kuba home, and Mrs. Lewis went downstairs after him so as to give him any needed assistance concerning the location of the telephone equipment. Thereupon Mrs. Kuba returned to her kitchen where she was in the process of preparing *hors d'oeuvres* for a party scheduled that evening in her home. Moments later she noticed the purported serviceman in front of her. The man, identified at the trial by Mrs. Kuba as the defendant, brandished a gun,

advised Mrs. Kuba that she was being "held up" and that he wanted all her diamonds or jewelry. He nudged Mrs. Kuba with the gun and directed her to the master bedroom. During this time, he admonished Mrs. Kuba to hold her face down, but she nonetheless continued to stare at him. He obtained Mrs. Kuba's jewel box, which apparently contained diamonds and other jewelry. He also gained possession of some of Mrs. Kuba's money and her furs. After accomplishing the foregoing, he told Mrs. Kuba to go into a closet and remain there for at least 10 minutes, which she did. The robber had apparently earlier locked Mrs. Lewis in the basement. The robbery, from its inception to its completion, took about 15 minutes.

Mrs. Kuba called the police upon emerging from the closet and gave the officers, when they arrived at the scene, a detailed description of the robber. Early in January, 1967, Mrs. Kuba identified a photograph from among 67 photographs shown her by the police, as a photo of the robber. Mrs. Kuba further testified that on July 27, 1967, she had occasion to again observe the man who had robbed her, this time at the Federal Court Building in Chicago. She had been contacted by Captain Kenneth O'Brien of the Oak Lawn Police Department, whereupon she went to the Federal Court Building. She walked into a particular courtroom pursuant to the direction of the officer and saw the person who had robbed her. This person was identified as the defendant. Mrs. Kuba saw the defendant again on July 31, 1967, three days after the date of defendant's arrest, when he came to her home and protested his innocence, advising her that she had mistakenly identified him as the perpetrator of a robbery in her home.

Captain O'Brien corroborated Mrs. Kuba's photographic identification and also her July 27, 1967, identification of the defendant in the Federal Court Building.

For the defense, Adolph Lewin testified that he was a jewelry manufacturer, that defendant had been his firm's employee on December 21, 1966, and that between the hours of 1:00 and 1:30 P.M. defendant had been in the firm offices located at 5 N. Wabash in Chicago. On cross-examination it was shown that Lewin had been out of the offices for lunch from about noon to 1:00 P.M. on the day in question. Further, Lewin "presumed" that defendant had also gone to lunch that day, although he didn't specifically recall seeing him leave. Lewin admitted that defendant could have left the store at times during the day for a few minutes, but doubted that he could have been gone for a greater period of time. Lewin also testified on cross-examination that his firm's sales invoices for the month of December, 1966, copies of which he brought with him to court, were numbered consecutively, in the chronological order of sales which had occurred, from No. 16355 through and including No. 16784; that the first invoice for December 21, 1966, was numbered P16665 and referred to a sale by defendant of a bracelet to C. Silvani. The number on this invoice was handwritten, and the witness testified that blank invoice forms were readily accessible at all times to his salesmen. Ordinarily, sales made to corporations were recorded on invoice forms having printed numbers thereon, while sales to individuals were recorded on slips bearing handwritten numbers. Sales to individuals were further identified by the appearance of a "P" immediately before the number on the sales slips. However, Lewin identified several sales slips made out by defendant for sales to individuals which did not bear the letter "P". Lewin further indicated that he presumed that a volume of business had occurred in the forenoon of December 21, 1966, during which period he was present at the store, leaving the clear inference that the recorded sale to C. Silvani, if made at or about the

time of the robbery, could not have been the first sale of the day, as indicated by Lewin's records. Lewin, who was acquainted with Carl Silvani, did not see the latter in his store on the day in question.

The foregoing constitutes a summary of all of the evidence adduced at the trial.

Defendant initially maintains that it was error of constitutional magnitude to allow the introduction of Mrs. Kuba's Federal Court Building identification of defendant as the robber. It is argued that defendant was entitled to the presence of counsel at this pretrial confrontation under the mandate of the United States Supreme Court's decisions in *United States* v. *Wade,* 388 U.S. 281, 18 L. E. 2d 1149, 87 S. Ct. 1926, and *Gilbert* v. *California,* 388 U.S. 263, 18 L. Ed. 2d 1178, 87 S. Ct. 1951. The question, under *Stovall* v. *Denno,* 388 U.S. 293, 18 L. Ed. 2d 1199, 87 S. Ct. 1967, is whether, under all the facts and circumstances the July 27, 1967, identification of defendant by Mrs. Kuba was accomplished through procedures so fundamentally unfair as to deprive defendant of his constitutional rights. In this regard it must be shown by defendant that the identification procedure employed was so conducive to misidentification as to deprive him of due process of law. (*People* v. *Nelson,* 40 Ill.2d 146, 150; see also *People* v. *McMath,* 45 Ill.2d 33.) We do not believe that such is the case here. In the first place, defendant had not yet been arrested when the identification took place, and as we observed in *Cesarz,* "It would be strange indeed to require counsel in a case such as this where defendant had not been placed under arrest and was unaware [at the outset] that he was being observed." (44 Ill.2d at page 184.) Secondly, and more importantly, we find nothing in the procedure here employed to be unduly suggestive to Mrs. Kuba. She observed defendant in a courtroom wherein proceedings

were taking place wholly unrelated to the charge in question. She had earlier demonstrated her recollection of the physical characteristics of the robber and had indeed previously identified a photograph of the robber from among 67 photographs submitted to her by the police. There is nothing whatever in the record which implies that defendant was pointed out to her by the authorities as she made her identification at the Federal Court Building. Furthermore, she immediately recognized the defendant upon entering the Federal courtroom. Under all of the circumstances, we do not believe the trial court erred in admitting the evidence in question as corroborating Mrs. Kuba's in-court identification of the accused as the robber. (*People* v. *McMath,* 45 Ill.2d 33, 37.) In any event, however, defendant's privately retained trial counsel made no substantive objection to the admission of evidence relating to the July 27, 1967, identification, or indeed to any of the identification testimony, and all questions with regard thereto are, accordingly, waived. *Cf. People* v. *French,* 33 Ill.2d 146, 149.

Defendant next argues that his conviction must be reversed because of the State's alleged intimidation of a prospective defense witness. In this connection, attached to defendant's motion for a new trial is the affidavit of Carl Silvani, which affidavit sets forth allegations which, if established, would clearly amount to coercion and intimidation of a prospective defense witness by the State. Thus, it is stated therein that Silvani was contacted by defendant sometime during the summer of 1967 with respect to Silvani's purchase of a gold bracelet from defendant on the date and at about the time the robbery took place. Silvani recalled the purchase, and, after he found among his records his receipt therefor, he went to the offices of defendant's trial counsel for a conference with defendant

and his attorney with respect to the circumstances of the bracelet purchase. At that time defendant's attorney advised Silvani that defendant had been charged with armed robbery and that Silvani would be an alibi witness. Silvani's prospective testimony was again discussed with defendant's trial counsel at the latter's office on November 19, 1968, two days before the trial commenced. At that time Silvani was asked to hold himself available for the balance of the week so that he could testify on defendant's behalf. On November 20, 1968, Silvani was served with a subpoena requiring his appearance at defendant's trial that same day. (The trial in fact commenced on November 21, 1968.) When Silvani got to the courtroom indicated in the subpoena, he learned from Thomas Tully, the assistant State's Attorney assigned to prosecute the instant case, that he had in fact been subpoenaed by the prosecution. Silvani was questioned by Tully and Captain Maurice Higgins, the chief of the State's Attorney's police, with regard to his contemplated testimony. He signed a court reporter's statement setting forth that he had in fact purchased a gold bracelet from defendant at Adolph Lewin, Inc., located at 5 North Wabash in Chicago. He was in the store from about 12:45 to 1:20 P.M. on December 21, 1966. Tully and Higgins advised Silvani that they disbelieved his narrative, and Silvani was warned of the consequences of perjury. The affidavit further states that Higgins called Silvani a liar in angry, abusive language, and that Tully advised Silvani that if he persisted in his story he would go to jail and lose his job at the Chicago Health Club. Silvani nonetheless maintained the truthfulness of his account of the bracelet purchase. However, in the face of the threat of incarceration and the loss of his job, Silvani advised Tully that he didn't want to testify on defendant's behalf. Tully then told Silvani that the State would want his testimony on the morning

of November 21, 1968, and Silvani agreed to appear. After Silvani left Tully's office he called defendant's counsel and advised him he would not be a defense witness. On November 21, 1968, Silvani, pursuant to Tully's request, came to the courtroom where defendant's trial was in progress and remained available all day. That evening Silvani received at his home a phone call from Captain Higgins during which his wife, who answered the phone, was threatened. When Silvani came to the phone, he was berated for having left the courthouse without permission. Higgins told Silvani to come to Higgins's office immediately. Silvani thereupon went to the courtroom of defendant's trial to seek relief from the court. Upon finding the courtroom vacant, Silvani called defendant's counsel and was advised that he was not required to see Higgins, and that if he were afraid, he should come to defense counsel's office, which he did. Defense counsel thereupon placed a phone call to Tully, demanding cessation of the harrassment of his prospective witness. At defense counsel's request, Silvani appeared at the courtroom in question the next day, November 22, 1968, and remained throughout the day. He advised defense counsel, however, that under no circumstances would he take the stand as a defense witness. As we have seen, Silvani did not testify at the trial for either defendant or the prosecution.

At the hearing on defendant's motion for a new trial, Silvani testified and substantially corroborated the allegations set forth in his affidavit. The court also heard the testimony of Jack Stein, defendant's trial counsel, who related, over objection by the State, the substance of Silvani's conversations with him with regard to the State's alleged abuse and intimidation of Silvani. Stein further stated that Silvani refused to testify voluntarily on behalf of defendant and that, under such circumstances, Stein

was unwilling to vouch for Silvani's testimony and did not call him. When asked why he did not immediately inform the trial judge of the alleged intimidation of his witness, Stein stated that he would necessarily have had to disclose to the court defendant's prior convictions in connection with the intimidation inquiry (one of the alleged acts of intimidation was the prosecution's informing Silvani of defendant's prior criminal record), and that he was unwilling to do that since his client was being tried by the court alone. Stein agreed, however, that he could have informed the trial judge of the alleged intimidation, asked for an inquiry with regard thereto, and then, if thought necessary, for a change of venue to another judge.

The court also heard, on the motion for a new trial, the testimony of Tully and Captain Higgins, the alleged intimidators. They admitted that they had declared to Silvani their disbelief of his account of the bracelet purchase; that they told him he was being "used" by defendant; that Tully advised him that defendant had a prior criminal record; and that they warned him of the consequences of perjury. Tully denied telling Silvani that if he testified for defendant he would lose his job and go to jail, or that he told Silvani that he would be a State's witness. Captain Higgins specifically denied that he had called Silvani a liar, that he had threatened Silvani's wife, or that he had spoken to Silvani in a loud belligerent tone. Tully further testified that he had disbelieved Silvani's statement as to the bracelet purchase in that Silvani told Tully during their interview that he (Silvani) had been initially contacted by defendant with regard to the contemplated alibi testimony prior to defendant's arrest, leaving, in Tully's mind, the clear inference that the alibi had been manufactured. Tully also disclosed during his testimony that Silvani denied any acquaintance with defendant prior to

the bracelet purchase. In this connection, several witnesses testified for the State at the hearing on the motion for a new trial that they had observed Silvani and defendant in close proximity to each other on several occasions at the Chicago Health Club prior to December 21, 1966.

The trial judge further heard, on the motion for a new trial, the testimony of Matthew Walsh, another assistant State's Attorney who had worked with Tully in the prosecution of defendant. Walsh testified that he had secured the issuance of a subpoena for Silvani's appearance on November 20, 1968, because he had mistakenly thought that the trial would indeed commence on that day, and not merely in order to secure Silvani's presence for interrogation. Walsh did, however, admit that it was his custom to interview prospective defense witnesses before they actually testified.

After hearing the foregoing testimony, the trial judge denied defendant's motion for a new trial, specifically finding, *inter alia*, that the State had not been guilty of either intimidating a prospective defense witness or abusing the court's process. We cannot say that his conclusions were erroneous. The threats and abuse charged by Silvani were specifically denied from the witness stand by those accused of same. Further, we have previously held that it is not improper for a prosecuting attorney to advise prospective witnesses of the penalties for perjury (*People* v. *Flowers*, 14 Ill.2d 406, 415), and we do not believe those charged with the responsibility of enforcing the criminal law should be precluded from voicing their disbelief of a prospective witness's contemplated testimony. While we do not approve of the prosecutor's advising a prospective defense witness of the accused's prior criminal record in an effort to dissuade such witness from testifying, it is clear that the

State's interview of Silvani did not deprive defendant of the use of Silvani as a witness. The record establishes that Silvani was present at the court largely throughout the trial and was thus available as a witness for either the defense or the State. *People* v. *Williams,* 40 Ill.2d 367 and *People* v. *Wilson,* 24 Ill.2d 425, relied upon by defendant, are not controlling in that in those cases the prosecuting authorities actually caused witnesses to leave the jurisdiction, insuring their unavailability to the defense. In *Thompson* v. *People,* 410 Ill. 256, it was charged that the authorities had not only refused to serve defense-requested process on a witness, but also had threatened certain witnesses and caused them to leave the jurisdiction until the trial was over. No such conduct appears here. Another case cited by defendant, *Gandy* v. *State,* 24 Neb. 716, 40 N.W. 302, is also inapposite. There the prosecutor candidly admitted that he sought to dissuade two witnesses from testifying for the defense, and that a number of assertions were made against the defendant to the prospective witnesses. As we have seen, the authorities here denied any overt attempts to dissuade Silvani from testifying. With regard to the claimed abuse of process, the record supports the trial court's conclusion that Silvani was subpoenaed to insure his attendance at the trial, and not for the purpose of intimidation. The subpoena apparently required his appearance at the courtroom in which defendant was to be tried and while court was in session, and, thus, *United States* v. *Standard Oil Company* (7th cir.), 316 F.2d 884, 897, cited by defendant, is inapposite. In that case it was held improper for the prosecution to cause the issuance of subpoenas compelling witnesses' attendance at a place other than the court at a time when the court was not in session.

The defendant next seeks to question the constitutionality of the so-called "alibi statute" (Ill. Rev. Stat. 1967, ch. 38, par. 114—14) on the ground that, in requiring an accused to either disclose prior to trial his intention to assert an alibi and the names and addresses of his alibi witnesses, or possibly be precluded from asserting the alibi at the trial, the statute forces the defendant to choose between his right to refuse to testify and his right to call witnesses in his defense. The Supreme Court of the United States in *Williams* v. *Florida,* 399 U.S. 78, 26 L. Ed. 2d 446, 90 S. Ct. 1893, decided June 22, 1970, disposes of this contention adversely to the defendant. Additionally, the record discloses no objection by the defense to the State's request for production of names and addresses of alibi witnesses, and no argument was made with regard thereto in defendant's motion for a new trial. It is clear that nonjurisdictional questions relating to constitutionality of a statute must be asserted in the trial court, and we hold that the matter is deemed waived. *United States* v. *Hoskins* (7th cir.), 406 F.2d 72, 74-75.

It is finally asserted that we should reduce defendant's sentence. While we do have the authority in a proper case to order the reduction of a sentence imposed by the trial court (see our Rule 615(b)(4), 43 Ill.2d R. 615(b)(4)), we do not think such power should be exercised here. The penalty prescribed by statute for armed robbery at the time of the offense herein was imprisonment in the penitentiary for an indeterminate term of not less than one year. (Ill. Rev. Stat. 1965, ch. 38, par. 18—2.) It was shown during the hearing in aggravation and mitigation that defendant had prior convictions for assault with a deadly weapon and four separate counts of armed robbery. Under such circumstances, it cannot be said that the possibility of his rehabilitation would be enhanced by a lighter

sentence. We believe that the trial judge, who observed the defendant and heard the evidence, was in a much better position than this court to render a proper sentence. *People* v. *Caldwell,* 39 Ill.2d 346; *People* v. *Taylor,* 33 Ill.2d 417.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

Mr. Justice Schaefer took no part in the consideration or decision in this case.

APPENDIX B

Judgment of the Supreme Court of Illinois, September 29, 1970:

"And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

"Therefore, it is considered by the Court that the judgment of the Appellate Court for the First District aforesaid, be affirmed in all things and stand in full force and effect, notwithstanding the said matter and things therein assigned as error."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1165

WILLIAM A. EUBANK,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

(On Petition for Writ of Certiorari to the Supreme Court of Illinois)

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINION BELOW

The opinion of the Supreme Court of Illinois is reported at 46 Ill. 2d 383, 263 N.E. 2d 869 (1970).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

CONSTITUTIONAL PROVISIONS

Petitioner relies on the Sixth and Fourteenth Amendments to the Constitution of the United States.

QUESTIONS PRESENTED

1. After this Court's decisions in *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967), may testimony be admitted at trial regarding a pre-arrest confrontation for identification purposes while petitioner was unrepresented by counsel?

2. Did the failure of petitioner's trial counsel to object to testimony about the counselless pre-arrest identification constitute a waiver of petitioner's Sixth Amendment rights?

STATEMENT OF THE CASE

On December 21, 1966, Mrs. Yolanda Kuba was robbed in her own home in broad daylight by an armed man who was dressed as a telephone company employee but was otherwise undisguised (Tr. 9, 11, 38-39). Mrs. Kuba estimated that the robber stayed in her home for about 15 minutes; during most of that time she stared at him, in spite of his warnings to hold her face down (Tr. 14, 17). Shortly after the armed robber drove away, Mrs. Kuba called the Oak Lawn Police Department which quickly sent several officers to her house under the command of Captain (then lieutenant) O'Brien (Tr. 17-18). Mrs. Kuba immediately furnished a description of the robber (Tr. 18).

On January 6, or 7, 1967, Captain O'Brien brought Mrs. Kuba a container of 67 police photos; she viewed

several of the pictures before identifying one as being a photograph of the man who robbed her (Tr. 60). Mrs. Kuba next identified the armed robber on July 27, 1967, when Captain O'Brien and an F.B.I. agent accompanied her to a courtroom in the Federal Building in Chicago. On one of the benches sat the petitioner and another man, neither of whom were in the custody of the Oak Lawn Police Department (Tr. 61-65). Mrs. Kuba, who was the first person to enter the courtroom, stopped suddenly and identified the petitioner as the man who had robbed her (Tr. 22-23). No conversation occurred between petitioner and his visitors in the courtroom, nor were any directions given the petitioner; both parties simply stared at each other (Tr. 23). *Later* on the same day, Captain O'Brien *arrested* the petitioner for the crime committed on December 21, 1966 (Tr. 61-62).

Petitioner was subsequently indicted for armed robbery in August, 1967, and was found guilty after a bench trial on November 22, 1968. The trial judge, Hon. Richard J. Fitzgerald, sentenced petitioner to imprisonment in the state penitentiary for a term of not less than ten nor more than fifteen years. In explaining his finding of guilty, Judge Fitzgerald emphasized Mrs. Kuba's prolonged unobstructed observation of the petitioner in her home during the robbery, her ability to recall important details and her certainty that petitioner was the same man who robbed her on December 21, 1966:

> THE COURT: I might say that the Court was impressed by the method and manner in which this witness testified, her ability to recall facts. I also must consider the fact that she was in her home, in surroundings that were natural to her. She was within the cloistered walls of her home, as it were, and if it was out on the street in unfamiliar surround-

ings, if the witness or the defendant had struck or beaten her, if he had acted in such a manner which would have riled her, these are factors that the Court took into consideration.

Here we have a witness who is in her own home. She is impressed by the gentlemanlyness of the defendant. She is impressed by the gentle manner in which he handled her. She is impressed by his dainty walk, as it were.

MR. STEIN: None of which is in evidence that the defendant has.

THE COURT: But the Court unfortunately has been able to see the defendant walking in and about the court room and these factors would have a tendency of leading the Court to believe that this witness truly and correctly was able to identify the defendant and under the facts and the circumstances, the lighting conditions within the confines of her own home, the conditions under which the identification was met, the manner in which the defendant conducted himself all give rise to believe that the witness had ample opportunities, was in an exceptionally fine area in which to make an identification and having been with the defendant for fifteen minutes in a condition and atmosphere which at no time put her in fear for her life which would in any manner have a tendency to naturally affect her ability or her senses, although the defendant had a gun he didn't seem to brandish it in any manner which would put her in fear for her life. (Tr. 147-148)

The judge concluded his explanation with the following words: "However, as I say the single identification was in the Court's opinion sufficient to warrant the identification (finding) in this case." (Tr. 152). Judge Fitzgerald referred to the testimony about the pre-arrest confrontation only as a corroborating episode which bolstered the State's case but which was not essential to the finding of guilty (Tr. 141-143).

The remaining facts in the case are adequately set forth in the petition.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO RIGHT TO COUNSEL AT THE TIME OF PRE-ARREST INVESTIGATORY IDENTIFICATION CONFRONTATIONS.

Respondent submits that the facts of the present case do not raise the question of whether this Court's rulings in *United States* v. *Wade,* 388 U.S. 218 (1967), and *Gilbert* v. *California,* 388 U.S. 263 (1967) should be limited to post-indictment confrontations or be extended to cover pre-indictment situations. The identification confrontation in the present case took place informally in a federal courtroom *before petitioner was even arrested* on the present charge and while the case was still in the investigatory stage (Tr. 61-62). At the time of the confrontation, no orders or questions were directed to the petitioner; Mrs. Kuba and petitioner simply stared at each other in silence (Tr. 23, 61-65). While seated in the federal courtroom, petitioner was certainly not in the custody of the Oak Lawn Police or any state officials. Indeed, it appears from the record that he was not in custody at all since he returned home that day and was found there when finally arrested (Tr. 62). Clearly, the facts here present the issue of whether there is a right to counsel in the *pre-arrest,* non-custodial investigatory stages before prosecution commences. Thus, the dispute between those courts applying *Wade* only after indictment has occurred and those courts which refuse to use indictment as the limiting criterion, is not directly relevant to a decision in the present case.

The Sixth Amendment itself guarantees the right to counsel only to an "accused" in "all criminal prosecu-

tions." Following from that phraseology, this Court's major decisions defining the right to counsel, including *Wade* and *Gilbert*, have been limited to situations where prosecution has actually begun in some form.

While reviewing its own string of right-to-counsel decisions in the course of the *Wade* opinion, this Court said: "In recognition of these realities of modern criminal prosecution, our cases have construed the Sixth Amendment guarantee to apply to "critical" stages of the proceedings." 388 U.S. at 224. The opinion then discussed the group of cases headed by *Powell* v. *Alabama*, 287 U.S. 45, in which the Court had found the period from arraignment to trial to be "perhaps the most critical period of the proceedings . . .," id at 57, during which the accused "requires the guiding hand of counsel . . .," id at 69. Next cited were the cases following the rule of Powell, ie: *Hamilton* v. *Alabama*, 368 U.S. 52 (1961); *White* v. *Maryland*, 373 U.S. 59 (1963); and *Massiah* v. *United States*, 377 U.S. 201 (1964). In each of these situations, criminal prosecution was already under way by virtue of indictment, arraignment or preliminary hearing. Justice Brennan, speaking for the Court, then reviewed the right-to-counsel cases founded upon Fifth Amendment considerations, *Escobedo* v. *Illinois*, 378 U.S. 478 (1964), and *Miranda* v. *Arizona*, 384 U.S. 436 (1966). The holding in *Escobedo* permitted counsel whenever the criminal process shifted from investigatory to accusatory; the defendant there had been in police custody when he requested counsel. In *Miranda*, the right to counsel at custodial interrogations was carefully formulated; it was to become effective whenever the police questioned a person after he had been "taken into custody or otherwise deprived of his freedom of action in any significant way[4]." 384 U.S. at 444. In footnote No. 4, Chief Justice

Warren explainted that this last quoted clause was what the Court had meant by an "accusatory" investigation in *Escobedo.*

All of these cases cited as precedents in *Wade* involved various critical stages of criminal prosecutions already in progress, as, of course, did *Wade* and *Gilbert* themselves. The defendant Wade had been indicted, arrested and given appointed counsel when the F.B.I. conducted a showup without notice to defense counsel. Gilbert had been indicted and had retained counsel when he was put in a police lineup without his lawyer being present. Thus, these two identification cases had progressed farther along the line of prosecution than many of the earlier right-to-counsel cases before they ran into Constitutional trouble over the absence of defense counsel. Therefore, it appears from all the above cases that an event such as an identification confrontation can be regarded as a "critical" stage requiring counsel only after a defendant has become the accused within the *Escobedo* and *Miranda* Rules. Certainly, none of this Court's landmark decisions have found a defendant's right to counsel existent prior to arrest, indictment or some other accusatory or custodial event which signals the beginning of a prosecution.

Several state and federal courts have concluded that a defendant has no right to counsel during investigatory identification confrontations occurring prior to arrest. Illinois is one such state; its position on this subject is not founded entirely upon *People* v. *Palmer,* 41 Ill. 2d 571, 244 N.E. 2d 173 (1969), a case where the defendant had been confronted by the victim between arrest and indictment, but rather is contained in *People* v. *Cesarz,* 44 Ill. 2d 180, 255 N.E. 2d 1, 4 (1969), a case quite similar to

the present one. The defendant Cesarz was among 50 or 60 people around a Holiday Inn pool when a witness to a murder-robbery was brought to the pool and asked if anyone there fitted his composite picture of the murderer. The witness picked out Cesarz and police asked him to come inside where the witness definitely identified him; Cesarz was then arrested. In rejecting a *Gilbert* challenge to the identification evidence, the Supreme Court of Illinois said: "It would be strange indeed to require counsel in a case such as this where defendant had not been placed under arrest and was unaware (at the outset) that he was being observed." 255 N.E. 2d at 4.

In *United States* v. *Davis*, 399 F. 2d 948, 951 (2nd Cir. 1968), *cert. denied*, 393 U.S. 987 (1968), the defendant was in custody for being a pedestrian on a Thruway when the officer, suspecting the defendant of driving a stolen car, presented him to a toll booth attendant and asked if the attendant had seen the young man driving a car earlier. This confrontation occurred without the presence of counsel but before the stolen auto charge had been made. The Court of Appeals in affirming the conviction said that *Wade* and its companion decisions did not intend to cover the situation where a confrontation occurred before the accusatory stage had been reached as depicted in *Escobedo* and *Miranda*. The court found that the mere fact of custody for an unrelated crime did not automatically trigger the Sixth Amendment right to counsel; also, mere suspicion of guilt did not amount to accusation in the *Escobedo-Miranda* sense. In the opinion, Judge Friendly stated that policemen should not be prevented from reasonably investigating their suspicions through such confrontations.

A District Court similarly refused to extend the *Wade* rule to a pre-arrest identification confrontation in *Bratten*

v. *State of Delaware*, 307 F. Supp. 643, 646 (D. Del. 1969). Police had summoned the robbery victim to a public inn where four Negroes had been involved in a minor auto accident. After asking Bratten to remove his sun glasses, the victim identified him and he was arrested. The court declined to apply the *Wade* trilogy because the confrontation took place before defendant was accused of the crime. The same conclusion had been reached in the case on appeal by the Supreme Court of Delaware. *Bratten* v. *State*, 257 A. 2d 230, 231 (1969).

Two state courts have decided cases which are almost carbon copies of the present case. In *State* v. *Moore*, 269 A. 2d 534, 536 (N.J. Super. Ct., App. Div., 1970), *N.J. cert. denied*, 57 N.J. 210, 271 A. 2d 5 (1970), the victim of a street robbery was on his way to sign a complaint on the day after the crime when he was told that some people arrested earlier at the same address for another charge were sitting in an adjoining courtroom. The defendant and at least nine others were in the courtroom; defendant had not been charged with the street robbery and had come to court that morning from his uncle's home. The victim made the identification, the defendant was arrested and the confrontation was brought out in testimony at trial. Defense counsel did not object to the identification testimony, but the court still considered the *Wade* challenge on its merits, although noting that defendant had waived his right to object. The court decided the issue in the following words:

> "Defendant misconceives not only the scope of *Wade* doctrine but also the issue we are called upon to decide in this case. That issue is not, as defendant's argument assumes, whether the *Wade* rule requiring the assistance of counsel should be applied to pre-indictment confrontations as well as post-indictment confrontations.

> Here we need not reach or decide that question to which the courts have given divergent answers . . . .
>
> Where, as here, the out-of-court identification takes place during the investigatory phase of the case, before the defendant is arrested or taken into police custody, *Wade* does not in any event apply; the presence of counsel is not required.*" (Footnote omitted.) 269 A. 2d at 536.

The Supreme Judicial Court of Maine reached a similar result in *State* v. *Butler,* 256 A. 2d 588, 590-591 (1969).

Other decisions upholding non-custodial or in-the-field confrontations against challenges based upon the *Wade* trilogy are *Bradford* v. *State,* 164 S.E. 2d 264 (Ga. App. 1968), *cert. denied,* 394 U.S. 1020 and *Commonwealth* v. *Bumpus,* 354 Mass. 494, 238 N.E. 2d 343 (1968), *cert. denied,* 393 U.S. 1034, *reh. denied,* 393 U.S. 1112. See also *State* v. *Tafoya,* 454 P. 2d 145, 147 (Ariz. Supreme Ct. 1969), holding that a post-information showup without counsel, preceded by photographic identification, is not a critical stage of the prosecution and therefore its admission into evidence was not prejudicial error.

Respondent agrees with the many decisions cited above that all identification confrontations are not *per se* a "critical stage" of a criminal proceeding. Those confrontations occurring before arrest, as the one in the present case, are especially outside the "critical" area since no prosecution can be said to have begun during this early investigatory stage. If the Court were to prohibit pre-arrest identification confrontations without counsel, then by logical extension even on-the-scene identification confrontations would become impossible and police investigative procedures would be unduly restricted. In *Simmons* v. *United States,* 390 U.S. 377, 384 (1968), this Court found initial identification by photograph to be

such a valuable investigative tool, "both for apprehending offenders and for sparing innocent suspects the ignominy of arrest," that it could not be prohibited as being hazardous to the suspect, except in the most suggestive circumstances. This argument can be made even more strongly in favor of personal identification confrontations prior to arrest. Mindful of the deep public interest in effective criminal law enforcement, respondent submits that petitioner had no right to counsel in his confrontation with Mrs. Kuba and that his petition should therefore be denied.

(Petitioner does not question the integrity of his identification confrontation under *Stovall* v. *Denno,* 388 U.S. 293 (1967). However, the Illinois Supreme Court applied *Stovall* to the present case in rendering their opinion and found that the confrontation was not unduly suggestive. *People* v. *Eubank,* reproduced in Petition, App. 4-5.

II.

IF THE RIGHT TO COUNSEL DID EXTEND TO PRE-ARREST IDENTIFICATION CONFRONTATIONS, THEN TESTIMONY ABOUT THE CONFRONTATION IN THE PRESENT CASE WOULD ONLY AMOUNT TO HARMLESS ERROR.

This Court has stated that testimony concerning an improper identification confrontation can escape the consequences of the *per se* exclusionary rule if the testimony is "'harmless beyond a reasonable doubt.' *Chapman* v. *State of California,* 386 U.S. 18, 24." *Gilbert* v. *California,* 388 U.S. at 274. In the present case, Mrs. Kuba, the victim, viewed the armed robber at close range in broad daylight for about fifteen minutes (Tr. 14, 17).

She recalled specific details of the robber's dress and mannerisms (Tr. 38, 39), and she picked petitioner's picture out of a group of 67 police photographs long before the confrontation took place in the federal courtroom (Tr. 60). The trial judge, as the trier of fact sitting without a jury, gave great weight to Mrs. Kuba's ability to remember details about the robber which could not have come from the confrontation. (See excerpt from judge's findings reproduced in the Statement of the Case, page 3.) In his own words, Judge Fitzgerald considered the confrontation on July 27, 1967, only as "corroborating evidence," and, under Illinois law, corroborating evidence was not needed to support Mrs. Kuba's identification and the court's judgment (Tr. 141-143). Thus, if petitioner's right to counsel had been violated, the resulting testimony was non-essential evidence and its admission constituted harmless error beyond a reasonable doubt.

III.

PETITIONER IS PRECLUDED FROM RAISING THE QUESTION OF HIS RIGHT TO HAVE COUNSEL AT THE PRE-ARREST CONFRONTATION SINCE HE NEVER PRESENTED THE QUESTION TO THE TRIAL COURT FOR ITS DETERMINATION.

Petitioner's trial counsel did not move to suppress evidence of the pre-arrest identification confrontation, and did not object to testimony about the event (Tr. 6-27, 55-65, 67-73, 131-146). Nor did his second defense lawyer raise this issue in the motions to vacate judgment and motions for a new trial (C. 35-67). There is no indication either in the record or in the petition that the two lawyers retained by petitioner were ignorant of the *Wade* trilogy or so lax in performing their duties that they

negligently failed to mention these cases to the trial court. In the absence of evidence to the contrary, we must presume that petitioner's two lawyers made a proper professional judgment not to include a *Gilbert* challenge in their trial and post-trial strategies. Such a determination is binding on the defendant-petitioner. *Henry* v. *Mississippi,* 379 U.S. 443, 451-452 (1965); *United States* v. *Marcello,* 423 F. 2d 993, 1005 (5th Cir. 1970), *cert. denied,* 90 S. Ct. 2172 (1970).

In *Henry,* this Court held that if the state's insistence on compliance with a procedural rule serves a legitimate state interest, then the defendant's procedural defaults may constitute waiver of his federal rights. Finding that the Mississippi contemporaneous objection rule clearly served a legitimate state interest, this Court observed that the purpose of the rule might have been satisfied in that case by the petitioner's motion for a directed verdict which notified the trial judge of the erroneous admission of the officer's testimony. This issue was not specifically decided, however, and the case was reversed and remanded because the record suggested that defense counsel, as part of their strategy, may have deliberately by-passed the opportunity to make timely objections. The by-pass issue had to be determined before final decision on the waiver question could be made; if deliberate by-pass were found, then petitioner's Fourth Amendment rights would have been waived, according to the *Henry* opinion.

In the present case, there may actually have been a deliberate by-pass of the *Gilbert* issue. Regardless, Illinois too has a legitimate interest in demanding that trial errors involving Constitutional rights be brought to the trial judge's attention. Speaking of this rule, the Supreme Court of Illinois has said: ". . . compliance

therewith focuses the trial court's attention on alleged error, thereby quite possibly obviating the necessity for appeals and reversals." *People* v. *French,* 33 Ill. 2d 146, 149 (1965), *cert. denied,* 384 U.S. 1016. Today, with the system of criminal justice subjected to such great stresses, the state's interest in limiting whenever possible the merry-go-round procedure of trial, reversal and retrial is even stronger. In the present case, unlike *Henry,* defense counsel *never* raised the *Gilbert* challenge *at any time* before an appeal was taken. By attempting to raise this question on appeal, petitioner is seeking to nullify the legitimate state interest in orderly procedure—an attempt not allowable under this Court's decision in *Henry.*

The Sixth Amendment right defined in the *Wade* trilogy is subject to waiver just as is the Fourth Amendment right involved in *Henry.* Several courts have already held that the question of improper identification of a defendant can be waived by failure to object or request a hearing. *Reese* v. *State,* 457 S.W. 2d 877 (Tenn. Ct. of Crim. App. 1970); *Wright* v. *State,* 457 S.W. 2d 55 (Texas Ct. of Crim. App. 1970); *Poole* v. *Commonwealth,* 176 S.E. 2d 821 (Va. Sup. Ct. 1970); *Williamson* v. *Commonwealth,* 175 S.E. 2d 285 (Va. Sup. Ct. 1970).

CONCLUSION

For the above reasons, respondent prays that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 1165

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WILLIAM A. EUBANK,

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vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition For A Writ of Certiorari To The Supreme Court of Illinois

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PETITION FOR REHEARING

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PETITION FOR REHEARING

The petitioner herein respectfully moves this Court for an order (1) vacating its denial of the petition for writ of certiorari, entered on May 17, 1971, and (2) granting the petition. As grounds for this motion, petitioner states the following:

THE GRANT OF CERTIORARI IN KIRBY v. ILLINOIS, No. 6401, OCT. TERM 1970.

On May 24, 1971, a few days after the denial of certiorari in the instant case, this Court granted certiorari in *Kirby* v. *Illinois,* No. 6401, Oct. Term, 1970, limited to the ques-

tion of "whether due process requires that an accused be advised of his right to counsel prior to a pre-indictment showup at a police station several hours after his arrest and forty-eight hours after the alleged crime occurred."

In the case at bar, *seven months after the robbery,* state police took the victim to the federal building in Chicago to identify petitioner who was seated alone and without counsel on a courtroom bench. Petitioner was apparently unaware of the surreptitious, prearranged identification.

Under the interpretation given *United States* v. *Wade,* 388 U.S. 218 (1967) and *Gilbert* v. *California,* 388 U.S. 263 (1967), by the Illinois state courts, from which both *Kirby* and the instant case arise, the right to counsel at a showup does not exist prior to indictment. *People* v. *Cesarz,* 44 Ill. 2d 180 (1969); *People* v. *Palmer,* 41 Ill. 2d 571 (1969). The examination of this interpretation, which will necessarily be made by this Court in its consideration of *Kirby,* properly involves the same basic issues raised by the instant case. At what point in the criminal process, from crime to trial, does the right to counsel for showups arise? May the prosecution by delaying the step of indictment—or of formal accusation—effectively deny the right to counsel? Is the need for the advice, protection and memory of counsel greater prior to indictment, let alone formal arrest when the defendant has no notice and less cause to identify and later to remember at trial the circumstances of the showup?

In most basic respects the facts of *Kirby* and the instant case are similar: in neither had the defendant been indicted at the time of the showup; in both a period of time (more than 48 hours in *Kirby;* more than seven months in the instant case) had elapsed since the alleged crime;

in both the showup was arranged by the prosecution rather than being a chance meeting between defendant and witness. The pre-arrest/post-arrest distinction, which does exist between *Kirby* and the instant case,* is a question of the point in the criminal process at which the right to counsel arises; both cases, however, call into question the Illinois rule holding that the operative point is the time of indictment.

In *Kirby,* this Court will hear and consider whether the right to counsel exists before the fact of indictment. The Court should, at the same time, hear and consider the instant case to determine the question, which is a necessary corollary of *Kirby,* of *how far* before indictment the right exists.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and review the judgment and opinion below.

Respectfully submitted,

THOMAS P. SULLIVAN
DOUGLAS C. NOHLGREN
Counsel for Petitioner

June 11, 1971

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* The record in this case is unclear as to whether or not defendant was under *federal* arrest at the time of the showup. It is clear, however, that he was not then under *state* arrest.

CERTIFICATE OF COUNSEL

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

.....

Counsel for Petitioner